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Supreme Court, U.S.
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No. 02-1812

In the Supreme Court of the United States

June Term 2003

RICHARD C. ANGINO; ALICE K. ANGINO; KING DRIVE CORP.,

Petitioners

v.

J. THOMAS VAN WAGNER; JEFFERY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Respondents

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANGINO & ROVNER, P.C.
RICHARD C. ANGINO
I.D. No. 07140
Counsel for Petitioners Richard C. Angino, Alice Angino and King Drive Corp.

4503 North Front Street
Harrisburg, PA 17110
(717) 238-6791

Clare Printing, Box 100, Sayre, PA 18840—(570) 888-2244

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STATEMENT OF THE CASE

Defendant Respondents' Brief asserts at page 2

> This petition makes abundant references to a document styled 'Plaintiffs' Summary of Undisputed Facts' submitted to the District Court. Petitioners state, 'The following facts are undisputed.' Pet., at 4. The statement is untrue and misleading to this Court. ...

Defendants/Respondents, however, fail to reference a single fact or assertion that "is untrue and misleading to this Court." Factual data such as the size of the Township, the number of residents, the type of housing, the size lot required for dwellings slope requirements, population and housing growth or lack of same, are all indisputable figures taken from census tables and or the Township's own Zoning and Land Development Ordinances.

Petitioners unsuccessful attempt to develop their property since 1989 is also similarly indisputable.

The parties March 16, 1998 settlement agreement clearly stated:

> The Anginos agree to withdraw their pending Federal Action which is in the nature of a federal Civil Rights action against the Township, its elected and appointed officials and to execute a Release of all of the Defendants in the Federal Action in the form attached hereto. The said withdrawal of the Federal Action shall be with prejudice with respect to all *past* acts and allegations contained in the pleadings in said Federal Action. *However, the Anginos do reserve the right, and the Township so agrees, to refer to the factual circumstances set forth in their present Federal Action in the event they should find it necessary to file a future cause of action against*

> *Middle Paxton Township*, but any such reference shall be solely for purposes of showing a *"course of conduct during an earlier period"* and not for purposes of establishing damages arising out of said conduct. Any damages to which the Anginos shall be entitled shall be solely based upon new factual circumstances arising after the date of this Agreement.

(67a) (emphasis added)

Petitioners' second amended complaint has a section "*D New Factual Circumstances Arising After the Date of the Settlement Agreement*" and follows with paragraphs 23-80 specifically referencing the 1998 comprehensive plan, the 2000 zoning ordinance, and specific civil rights violations that have occurred *since 1998* involving the interpretation of existing laws and the refusal to grant appropriate variances and permits as well as making unreasonable demands for development which led to Judge Turgeon's finding the Township to be guilty of bad faith. (Paras. 68-71 of the Second Amended Complaint; 74a-75a; *also see* Paras. 77-80, 75a-77a)

The reference to the Trial Judge's dismissal of the instant action "without prejudice" fails to consider that delay and multiple actions in and of themselves constitute prejudice. Delay in and of itself may result in bankruptcy or inability to proceed with a particular development. Associated legal expenses can similarly roadblock a project. Our Constitutional right to do what we want with our property should not be further eroded by a "ripeness" doctrine that provides little benefit and can be a municipal tool to stymie development.

REASONS FOR GRANTING THE WRIT

Defendants/Respondents assert "none of these issues satisfy the criteria under Rule 10 of this Court with respect to considerations governing review on Certiorari. The Petitioners present no compelling reason for grant of Certiorari. They present no decision in conflict with the decision of any other court on the same important matter nor does this decision depart "from the accepted and usual course of judicial proceedings."

As for "compelling reason," your Court has found a compelling reason to address zoning issues on a number of occasions over the last decade. You last addressed "ripeness" in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Defendants/Respondents contend that the *Williamson Planning* decision is "settled law." The interpretation of the Third Circuit and the District Court, however, in the instant case have extended *Williamson Planning* far beyond your intent and your language to require that constitutional challenges be pursued with respect to ordinances passed by the highest public officials after years of comprehensive plan meetings, public hearings, zoning meetings, etc. In this case, that process took five years from 1995 to 2000. The constitutional challenge process has already taken almost a year and a half and twelve hearings. It may be another six months or a year until the supervisors render a decision as to the constitutional challenge.

The same supervisors who passed the 2000 zoning ordinance are the judges who will eventually decide the constitutionality of the zoning ordinance that they passed in the year

2000. Presumably, these supervisors received legal advice *prior* to adopting the 2000 zoning ordinance. The factual record in the instant case is clear that Petitioners wrote the township supervisors numerous letters and at the time had pending a civil rights action challenging the constitutionality and/or propriety of the 2000 zoning ordinance. Petitioner's second amended complaint challenged the constitutionality and propriety of the 2000 zoning ordinance To require, in addition the constitutional challenge process to finality constitutes a waste of time, money, and judicial resources. As discussed under the "statement of the case", the "ripeness" prerequisite may be used by anti-developmental municipal bodies as another shield to preclude development.

If the supervisors agreed with Petitioners, they could have long since this time amended the 2000 ordinance to conform with the law. They have chosen not to do this. It is highly unlikely that they will decide in Petitioner's favor as to the constitutional challenge because to do so, they would have to admit that they were wrong in adopting the 2000 zoning ordinance. If they admit that they were wrong, that will be a foundation for the civil rights action. If they refuse to admit that they are wrong, Petitioner's civil rights action will then become "ripe" and Petitioners will be able to proceed with same. In either case, Petitioners will be able to and will proceed with their civil rights action.

The Pennsylvania Supreme Court has recently unanimously decided *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002) which strongly supports Petitioner's position as to zoning passed for the purpose of maintaining a bucolic or country community and/or to require large lots for the purpose of maintaining what the highest political officials feel is an attractive, desirable bucolic, country, agricultural setting.

Reasons for Granting the Writ

Although Defendants/Respondents' decisions with respect to the 1998 comprehensive plan and 2000 zoning ordinance are a major part of Petitioner's second amended complaint, the civil rights violations asserted therein did not even exist at the time of Petitioner's original complaint and amended complaint and, consequently, the allegations raised in the original complaint and the Amended Complaint cannot logically or legally be and were not initially dismissed on the issue of "ripeness" which Defendants/Respondents admit applies to the 2000 zoning ordinance and was raised only as to the 2000 zoning ordinance.

If Defendant Respondents contend that "ripeness" applies to each and every decision made by the highest political body, in interpreting laws and/or granting permits on variances it again would be extending *Williamson Planning* far beyond its language and intent which was to apply to decisions of lower level officials or employees. Also to require the highest level decisions for each and every claimed civil rights violation would result in near impossibility in proceeding against municipal bodies where there are a variety of violations, each of which would have to be carried through to a final appeal and a final decision by the highest municipal officials.

Finally, it is clear from Petitioner's Writ that Defendant's actions are not only in conflict with Your Court's decision in *Williamson Planning Commission* but also *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd on other grounds*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989). It is Petitioner's position also that the Third Circuit's decision in the instant case is an impermissible extension of the Third Circuit's decisions in *New Hanover Township v. United States Army Corps of Engineers*, 992 F.2d 470

(3rd Cir. 1993); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3rd Cir. 1993); *Acierno v. Mitchell*, 6 F.3d 970 (3rd Cir. 1993); *Sameric Corp. of Delaware v. City of Philadelphia*, 142 F.3d 582 (3rd Cir. 1998). *See, Acierno v. New Castle County*, 2000 U.S. Dist. LEXIS 7853 (D. Del. May 23, 2000) as to the six or seven-year delay from the District Court decision dismissing the case on ripeness, refiling, and the eventual decision reached by the trial court. The instant case had proceeded to the point of trial when it was at the last moment dismissed on a ripeness basis. It will obviously be at least another year until Petitioners can refile. Your Court's guidance is needed to preclude future delays, expense, and waste of judicial resources.

Respectfully submitted
ANGINO & ROVNER, P.C.
RICHARD C. ANGINO
I.D. No. 07140
Counsel for Petitioners

PROOF OF SERVICE

I, Richard C. Angino, Esquire, hereby certify that I have this 28th day of July, 2003, served three true and correct copies of Petitioners' Reply Brief by sending same by United States first-class mail, postage prepaid, to the following:

Christopher S. Underhill, Esquire
Hartman, Underhill & Brubaker, LLP
221 East Chestnut Street
Lancaster, PA 17602-2782
Counsel for Light-Heigel & Associates, Inc.

C. Kent Price, Esquire
Thomas, Thomas & Hafer, LLP
305 North Front Street
P.O. Box 999
Harrisburg, PA 17108-0999
Counsel for J. Thomas Van Wagner, Jeffery Smith, Richard Peffer, Middle Paxton Township and Mary Jane Davis

Kathryn L. Simpson, Esquire
Mette, Evans & Woodside
3401 North Front Street
P.O. Box 5950
Harrisburg, PA 17110-0950
Counsel for Jeffrey A. Ernico and Mette, Evans & Woodside

Jeffrey P. Lewis, Esquire
McKissock & Hoffman, P.C.
105 East Evans Street, Suite D
P.O. Box 3086
West Chester, PA 19381
Attorney for Jeffrey A. Ernico and Mette, Evans & Woodside

I further certify that all parties required to be served have been served.

Richard C. Angino

Richard C. Angino, Esquire
I.D. No. 07140
4503 North Front Street
Harrisburg, PA 17110
(717) 238-6791
Counsel for Appellants